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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1961

No. 306

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

vs.

W. TERRILL MORRIS; JUANITA D. MORRIS; JOHN HAROLD SWANSON; NANCY PAULSON, a minor; VALERY STRATTON, a minor; SAMUEL E. STRATTON; LORRAIN STRATTON; EARL B. PAULSON; GEORGIA PAULSON; PUBLIC SERVICE COMPANY, a division of Commonwealth Edison Company, a corporation,

Respondents.

On Petition for Writ of Certiorari to the Illinois Appellate Court (Second District)

BRIEF OF CERTAIN RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

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OCTOBER TERM, A.D. 1961

No. 306

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

vs.

W. TERRILL MORRIS; JUANITA D. MORRIS; JOHN HAROLD SWANSON; NANCY PAULSON, a minor; VALERY STRATTON, a minor; SAMUEL E. STRATTON; LORRAIN STRATTON; EARL B. PAULSON; GEORGIA PAULSON; PUBLIC SERVICE COMPANY, a division of Commonwealth Edison Company, a corporation,

Respondents.

On Petition for Writ of Certiorari to the Illinois Appellate Court (Second District)

BRIEF OF CERTAIN RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OBJECTIONS TO THE JURISDICTION.

Respondents respectfully object that 28 U.S.C.A., Sec. 1257, vests no jurisdiction in this Court to entertain the instant cause for these reasons:

(1) The complete record in *Farmers Automobile Insurance Ass'n.* v. *Janusick*, 30 Ill. App. 2d 352, is not before this Court. Inasmuch as the petition fails to state the course of the *Janusick* case subsequent to denial of rehearing therein, the record as filed in this Court involves no federal question;

(2) It is not competent for this Court to review the Illinois Supreme Court's order denying motion to reconsider denial of petition for leave to appeal (Petitioner's Appendix F, pp. 39a-40a);

(3) Petitioner's constitutional foundation (Petitioner's Appendix E, pp. 34a-38a) was procedurally tardy and is a mere assertion of right without real and substantial controversy.

ADDITIONAL STATEMENT OF THE CASE.

Petitioner's statement of the case tends to mislead in the following respect:

The cause here sought to be reviewed was decided by the Illinois Appellate Court (Second District), *Second Division*, by Justices DeWitt S. Crow, Clarence E. Wright and John F. Spivey (Petitioner's Appendix A, pp. 1a-20a, reported as 29 Ill. App. 2d 451).

Farmers Automobile Insurance Ass'n. v. *Janusick*, 30 Ill. App. 2d 352, was decided by the Illinois Appellate Court (Second District), *First Division*, by Justices Dan H. McNeal, Franklin R. Dove and Samuel O. Smith (Petitioner's Appendix B, pp. 21a-29a). Both divisions of the Appellate Court (Second District) sit at Ottawa, Illinois.

REASONS FOR DENYING THE WRIT.

The petition herein should be denied for the following jurisdictional and substantive reasons:

I.

THE RECORD HEREIN DISCLOSES NO FEDERAL QUESTION AND, ACCORDINGLY, THIS COURT DERIVES NO JURISDICTION BY VIRTUE OF 28 U.S.C.A., SEC. 1257 (3).

The instant petition amorphously charges two Illinois courts with constitutional error. It accuses the Illinois Supreme Court of having denied equal protection of the law and the Second Division of the Illinois Appellate Court (Second District) of having denied due process and equal protection.

The nub of the petition, however, is that a decision of the *First Division* of the Illinois Appellate Court (Second District) in *Farmers Automobile Insurance Ass'n.* v. *Janusick*, 30 Ill. App. 2d 352 (Petitioner's Appendix B, pp. 21a-29a), the current status of which Petitioner does not disclose, is divergent from the decision of this cause by the *Second Division* of that court (Petitioner's Appendix A, pp. 1a-20a, reported as 29 Ill. App. 2d 451), the result of which decision has been approved by the Illinois Supreme Court's refusal to review (Petitioner's Appendix D, pp. 32a-33a). *Walters* v. *Walters*, 409 Ill. 298, 305; *Illinois Central R. Co.* v. *Michigan Central R. Co.*, 18 Ill. App. 2d 462, 485; *McCann* v. *Continental Casualty Co.*, 6 Ill. App. 2d 527, 534, 535.

Respondents submit that, considering the entire record as filed, this divergence of decisions does not constitute a federal question (*Snowden* v. *Hughes*, 321 U.S. 1, 64

S. Ct. 397, 88 L. ed. 497; *Backus Jr. & Son* v. *Fort Street Union Depot Co.*, 169 U.S. 557, 18 S. Ct. 445, 42 L. ed. 853, 859, 860); secondly, the petition's charge of grievance by the Illinois Supreme Court is no part of the Second Division's judgment here sought to be reviewed and, thus, is not proper matter for this Court's consideration (*Michigan-Wisconsin P. L. Co.* v. *Calvert*, 347 U.S. 157, 74 S. Ct. 396, 98 L. ed. 583, 588); thirdly, Petitioner's attempt to raise a so-called federal question is a mere naked assertion of constitutional claim without real and substantial controversy (*United States Fidelity and Guaranty Co.* v. *Oklahoma*, 250 U.S. 111, 39 S. Ct. 399, 63 L. ed. 876; *Ennis Waterworks* v. *Ennis*, 233 U.S. 652, 658, 34 S. Ct. 767, 58 L. ed. 1139, 1141), which assertion procedurally came too late in the litigation. *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 65 S. Ct. 1475, 89 L. ed. 2092; *American Surety Co.* v. *Baldwin*, 287 U.S. 156, 53 S. Ct. 98, 77 L. ed. 231, 236.

I. In view of the Illinois Supreme Court's refusal to review the Second Division's decision herein (Petitioner's Appendices A, pp. 1a-20a, D, pp. 32a-33a), the Second Division becomes, for purposes of this Court's jurisdiction, the highest court of a state in which a decision could be had (*Michigan-Wisconsin P. L. Co.* v. *Calvert*, 347 U.S. 157, 74 S. Ct. 396, 98 L. ed. 583, 588; *American Railway Exp. Co.* v. *Levee*, 263 U.S. 19, 44 S. Ct. 11, 68 L. ed. 140, 143), and its judgment is the judgment sought to be reviewed. The record reveals that at no time was any federal question either presented to, or passed upon, by the Second Division.

The instant cause was submitted to the Second Division as a pure question of local civil procedure, namely, whether

the declaratory judgment provision of the Illinois Civil Practice Act (Ill. Rev. Stat., 1959, Chap. 110, Sec. 57.1) (Petitioner's Appendix G, pp. 41a-42a) could properly be substituted for the traditionally adequate remedies of garnishment and policy suits. On authority of previously decided Illinois and Michigan cases, the Second Division agreed that Petitioner's attempted substitution of remedies was improper (Petitioner's Appendix A, pp. 1a-20a). It is this decision that Petitioner would ultimately have this Court reverse, after re-construing the declaratory judgment statute to suit Petitioner's fancy.

After the Second Division filed its opinion on April 4, 1961, Petitioner had fifteen days in which to seek rehearing (Respondents' Appendix A, p. 1a). Had Petitioner elected this course, the apparent divergence between the Second Division's decision and the First Division's decision in the *Janusick* case would have come to light of both Petitioner and the two divisions of the court. Instead, with fifteen days' rehearing time plus forty days' appeal time to expend (see Respondents' Appendix B, p. 2a), Petitioner elected to seek review in the Illinois Supreme Court. In short, Petitioner's own folly caused the Second Division to lose jurisdiction.

In petitioning the Illinois Supreme Court for review, Petitioner again set forth wholly nonfederal grounds for reversal. The Illinois Supreme Court, with no federal question before it, denied review without opinion (Petitioner's Appendix D, pp. 32a-33a).

Only thereafter did Petitioner disclose its awareness of the *Janusick* case and, in a belated attempt to be diligent, return to the Illinois Supreme Court with a motion

to reconsider that court's prior refusal of review (Petitioner's Appendix E, pp. 34a-38a). In this motion Petitioner alleged for the first time that, by virtue of the *Janusick* decision, the Second Division had deprived it of due process and equal protection of the law.

In light of the *Janusick* case's current status, concerning which the petition remains silent, Respondents believe that if a federal question can ever arise, that question can arise, only in the *Janusick* case, and only if and when the Illinois Supreme Court shall have been afforded an opportunity to review that case and shall thereafter have refused review. See *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 75 S. Ct. 614, 99 L. ed. 897, 903; *Parker* v. *County of Los Angeles*, 338 U.S. 327, 70 S. Ct. 396, 94 L. ed. 144. Even at that time the existence of a federal question would necessarily depend, not upon an apparent similarity in the factual pictures presented by the two cases, but rather upon an identity of the trial and appellate court records in each case. Since the record of the *Janusick* case is not before this Court, further attempts to compare or distinguish seem inappropriate.

Should the Illinois Supreme Court be afforded the opportunity and thereafter refuse to review the *Janusick* case, and should the trial and appellate court records of the two cases then be thought to be identical so as to give rise to a possible federal question, that federal question, if any, would inure, not to this Petitioner's benefit, but to the benefit of the losing party in the *Janusick* case. This Petitioner is not entitled to predicate its alleged right upon a case yet to be decided between strangers. *Milwaukee E. R. & L. Co.* v. *Wisconsin*, 252 U.S. 100, 40 S. Ct. 306, 64 L. ed. 476.

II. The Illinois Supreme Court order denying Petitioner's motion to reconsider denial of leave to appeal (Petitioner's Appendices E, pp. 34a-38a, and F, pp. 39a-40a) is not an essential part of the Second Division's decision (Petitioner's Appendix A, pp. 1a-20a) here sought to be reviewed. Nor did the Illinois Supreme Court pass upon any federal question in denying the motion (Petitioner's Appendix F, pp. 39a-40a) and, in light of what follows concerning the adequacy of state grounds to support the Second Division's decision, it cannot be said that the Illinois Supreme Court evaded any federal question. It is Respondents' position, accordingly, that the order denying the motion to reconsider (Petitioner's Appendix F, pp. 39a-40a) and the petition's claim of constitutional grievance by reason thereof, ought not to be considered by this Court.

III. It is further submitted that Petitioner's allegations of unconstitutionality (Petitioner's Appendix E, pp. 34a-38a) are mere naked assertions of a claim in respect of some constitutional right, which assertions, in the absence of a real and substantial controversy of the required character which deserves serious consideration, are entirely insufficient. *United States Fidelity and Guaranty Co.* v. *Oklahoma,* 250 U.S. 111, 39 S. Ct. 399, 63 L. ed. 876; *Ennis Waterworks* v. *Ennis,* 233 U.S. 652, 658, 34 S. Ct. 767, 58 L. ed. 1139, 1141.

Respondents also urge that Petitioner's attempt to wedge a so-called federal question into this record after the Second Division's decision on state grounds (Petitioner's Appendix A, pp. 1a-20a) and after the Illinois Supreme Court's approval on purely state grounds (Petitioner's Appendix D, pp. 32a-33a), came too late in the litigation to

permit of this Court's assumption of jurisdiction. *Radio Station WOW, Inc.* v. *Johnson,* 326 U.S. 120, 65 S. Ct. 1475, 89 L. ed. 2092; *American Surety Co.* v. *Baldwin,* 287 U.S. 156, 53 S. Ct. 98, 77 L. ed. 231, 236.

II.

APART FROM THE LIMITATIONS OF 28 U.S.C.A., SEC. 1257 (3), THIS COURT WILL NOT REVIEW A STATE COURT DECISION WHOLLY SUSTAINABLE ON STATE GROUNDS.

This Court has repeatedly declined to review a state court decision unless it affirmatively appeared that there was no adequate state ground to support the decision. *Durley* v. *Mayo,* 351 U.S. 277, 281, 76 S. Ct. 806, 100 L. ed. 1178, 1183; *Stembridge* v. *Georgia,* 343 U.S. 541, 547, 72 S. Ct. 834, 96 L. ed. 1130; *Flournoy* v. *Wiener,* 321 U.S. 253, 64 S. Ct. 548, 88 L. ed. 708; *Lynch* v. *New York,* 293 U.S. 52, 55 S. Ct. 16, 79 L. ed. 191.

Without waiving their objection that the instant record contains no federal question, Respondents urge that this Court should decline jurisdiction inasmuch as the petition herein not only fails to show that the Second Division's decision (Petitioner's Appendix A, pp. 1a-20a) and the Illinois Supreme Court's refusal to review (Petitioner's Appendix D, pp. 32a-33a) were not predicated upon adequate state grounds but, on the contrary, the petition affirmatively shows that the decision and order denying leave to appeal were based wholly on adequate state grounds.

III.

THE INSTANT CAUSE LACKS THE "SPECIAL AND IMPORTANT" REASONS FOR REVIEW CONTEMPLATED BY RULE 19 OF THIS COURT.

Notwithstanding Petitioner's suggestion of great importance to the citizenry, this litigation possesses neither the "federal question" nor the "question of substance" required by Rule 19 (Respondents' Appendix C, p. 5a) nor those nationally momentous qualities that justify congesting this Court's docket. When all unnecessary and fallen-behind parties are eliminated, this cause is, in simplest form, a "principle" suit between insurance company and minor child, Valerey L. Stratton, the fight continuing only through obstinacy of counsel.

As this Court has indicated in *Rice* v. *Sioux City Cemetery*, 349 U. S. 70, 75 S. Ct. 614, 99 L. ed. 897, 901, in discussing Rule 19,—

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of particular litigants" (Citations omitted).

Also apropos is the language of Mr. Chief Justice Taft, that:

> "If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of

opinion and authority between the circuit courts of appeal." *Layne and Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393, 43 S. Ct. 422, 67 L. ed. 712, 714.

IV.

ABSENT A SHOWING OF INTENTIONAL OR PURPOSEFUL DISCRIMINATION, NEITHER INCONSISTENT NOR ERRONEOUS JUDICIAL DECISIONS ARE VIOLATIVE OF THE FOURTEENTH AMENDMENT.

In what appears to be an allusion to a clear and intentional design or purpose to discriminate, Petitioner emphasizes that the decision herein (Petitioner's Appendix A, pp. 1a-20a) and the decision in the *Janusick* case (Petitioner's Appendix B, pp. 21a-29a) were both made by "the same Court." Respondents concede that both divisions of the Appellate Court (Second District) constitute the same court, but they fail to grasp a distinction between a divergence of opinions between two divisions of the same Appellate Court district on one hand, and a divergence of opinions between two Appellate Court districts or between two Federal Courts of Appeals, on the other hand.

This Court has stated in *Milwaukee E. R. & L. Co.* v. *Wisconsin*, 252 U.S. 100, 105, 40 S. Ct. 306, 64 L. ed. 476, 480:

> "• • • the 14th Amendment does not, in guaranteeing equal protection of the laws, assure uniformity of judicial decisions (*Backus Jr. & Son* v. *Fort Street Union Depot Co.*, 169 U.S. 557, 569, 42 L. ed. 853, 859, 18 Sup. Ct. Rep. 445), any more than, in guaranteeing due process, it assures immunity from judicial error." (Citations omitted) (See also *Stein* v. *New York*, 346 U.S. 156, 73 S. Ct. 1077, 97 L. ed. 1522)
>
> "Unlike *Gelpcke* v. *Dubuque*, 1 Wall. 175, 17 L. ed. 520, and *Muhlker* v. *New York*, 197 U.S. 544, 49 L.

> ed. 872, 25 Sup. Ct. Rep. 522, where protection was afforded to rights acquired on the faith of decisions later overruled, the company seeks here to base rights on a later decision between strangers, which, it alleges, is irreconcilable on a matter of law with a decision theretofore rendered against it. The contention is clearly unsound."

Directly in point is the language of *Backus Jr. & Son* v. *Fort Street Union Depot Co.*, 169 U.S. 557, 18 S. Ct. 445, 42 L. ed. 853, 859, that:

> "* * * there is no absolute right vested in the individual as against the power of the legislature to change modes of procedure. And a similar thought controls where the courts of the state have construed a statute as prescribing one form of procedure, and parties have acted under that construction, and then subsequently the same court has held that the statute was theretofore misconstrued, and really provided a different mode of procedure. The last adjudication cannot be set aside in the Federal courts on the ground of an unjust discrimination or a denial of the equal protection of the laws."

In *Snowden* v. *Hughes*, 321 U.S. 1, 64 S. Ct. 397, 88 L. ed. 497, this Court held that there must be a clear and intentional discrimination by state officers to constitute denial of equal protection, and this discriminatory purpose is not presumed.

The petition herein utterly fails to make out a case of clear and intentional purpose or design to discriminate, and the phraseology "intentional and invidious" and "whatever its motives," as applied to the Illinois Appellate and Supreme Courts, discloses nothing as to any such purpose or design. *Snowden* v. *Hughes*, 321 U.S. 1, 64 S. Ct. 397, 88 L. ed. 497.

CONCLUSION.

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in this Court, and that the petition should be denied with such sanctions and costs as this Court shall determine.

Respectfully submitted,

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APPENDIX A.

Appellate Court Rule 14

Ill. Rev. Stat. 1959, Chap. 110, Sec. 201.14. *Petitions for Rehearing.*

"Within 15 days after a decision is entered of record the party desiring a rehearing shall file with the clerk of this court 9 printed copies of the petition for rehearing, together with proof of service of 3 copies thereof upon the opposing party or his attorney. Upon written motion, supported by affidavit, showing good cause, made within 15 days after the filing of the opinion, or within any extensions thereof, the court or any judge thereof in vacation may extend the time for filing the petition for rehearing. The petition shall state concisely the points supposed to have been overlooked or misapprehended by the court, with proper reference to the particular portion of the abstract, or record if the filing of an abstract has been excused, and brief relied upon. Reargument of the case shall not be made in the petition. The opposing party shall have 15 days from the granting of the rehearing to answer the petition, and the petitioner shall have 10 days to file his reply. Three copies of each shall be served on opposing counsel. When a rehearing is granted, the original briefs of the parties and the petition for rehearing, answer and reply, shall stand as briefs on the rehearing. Oral argument will be permitted only when ordered by the court on its own motion."

APPENDIX B.

Civil Practice Act, Sec. 75

Ill. Rev. Stat. 1959, Chap. 110, Sec. 75. *Jurisdiction of Appellate and Supreme Courts.*

"(1) Appeals shall be taken directly to the Supreme Court (a) in all cases in which a franchise or freehold or the validity of a statute or a construction of the constitution is involved, (b) in all cases relating to revenue, or in which the State is interested as a party or otherwise and (c) in cases in which the validity of a municipal ordinance or county zoning ordinance or resolution is involved and in which the trial judge certifies that in his opinion the public interest so requires.

"(2) In all cases in which their jurisdiction is invoked pursuant to law, except those wherein appeals are specifically required by the constitution of the State to be allowed from the Appellate Courts to the Supreme Court, the judgments or decrees of the Appellate Courts shall be final, subject however, to the following exceptions: (a) in case a majority of the judges of the Appellate Court or of any branch thereof shall be of the opinion that a case decided by them involves a question of such importance, either on account of principal or collateral interest, as that it should be passed upon by the Supreme Court, they may in such case grant leave to appeal to the Supreme Court on petition of parties to the cause, in which case the said Appellate Court shall certify to the Supreme Court the grounds of granting said appeal. (b) In any

such case as is hereinbefore made final in the Appellate Courts it is competent for the Supreme Court to grant leave to appeal for its review and determination with the same power and authority in the case, and with like effect, as if it had been carried by appeal to the Supreme Court. (c) In any case heard and determined in the trial court upon actual trial in which the Appellate Court upon appeal from the final judgment or decree entered in the cause in the trial court reverses the judgment or decree and remands the cause for a new trial or hearing, and in which the party in whose favor the trial court's judgment or decree was rendered presents to and files with the Appellate Court an affidavit stating that he will be unable on a future trial or hearing to adduce other or additional evidence, facts or circumstances than were adduced in the trial court and expressly waiving the right to a new trial or hearing and consenting and requesting that the portion of the judgment of the Appellate Court remanding the cause for new trial or hearing be deleted and stricken from the judgment of the Appellate Court, then that court upon motion shall amend its judgment by striking out the portion thereof remanding the cause for new trial or hearing. Thereupon it is competent for the Supreme Court to grant leave to appeal from such final judgment of reversal for its review and determination with the same power and authority in the case, and with like effect, as in other cases in which leave to appeal from the final judgments of the Appellate Courts is authorized in this section.

"Provided, however, the application under this Act to the Supreme Court to cause it to grant leave to appeal for its review and determination shall be made within 40

days after the judgment of the Appellate Court has become final, either through the denial of a petition for rehearing or the expiration of the time within which a petition for rehearing might be filed; otherwise the power of the Supreme Court to review the judgment and decree of the Appellate Court shall cease to exist. Answers to such petitions for leave to appeal may be filed by respondent within 15 days after the expiration of the time for the filing of the petition for leave to appeal or within such further time as the Supreme Court or some Justice thereof in vacation may grant, if granting within such 15-day period. As amended 1959, July 21, Laws 1959, p. 1784, Sec. 1."

APPENDIX C.

Rule 19 of the Revised Rules of the Supreme Court of the United States

19.

Considerations Governing Review on Certiorari.

"1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

"(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

"(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

(Appendix)

"2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, or of any other court whose determinations are by law reviewable on writ of certiorari."